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No. 95-656

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1995

Canadian General Insurance Company,

Petitioner,

vs.

Domtar Inc., Niagara Fire Insurance Company, Continental Insurance Company, World Auxiliary Insurance Corporation Limited and Certain Underwriters at Lloyd's of London,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF OF RESPONDENT DOMTAR INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court, consistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, may exercise personal jurisdiction over a Canadian commercial liability insurer that had agreed to defend and indemnify a Canadian insured in the forum state against claims arising in the forum state out of manufacturing operations conducted in the forum state.

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STATEMENT OF THE CASE

I. The Underlying Claims and Action against the Insurers.

From 1924 to 1954, Domtar Inc. ("Domtar") owned and operated a plant for processing coal tars in Duluth, Minnesota. Appendix to Brief of Respondent Domtar Inc. to Minnesota Supreme Court ("R.A.") at 5 (Case No. CX-93-2449, filed February 7, 1994). The plant was located on the banks of the St. Louis River, which flows into Lake Superior, R.A. at 3, and adjoined a large pig iron manufacturing plant that provided Domtar with coal tar as a by-product of coking operations. R.A. at 19. Domtar distilled the coal tar into various products for resale, including roofing tar and road tar. R.A. at 5. The Minnesota Pollution Control Agency ("MPCA") has designated the entire area, including ground and surface waters, as a priority site.

In December 1991, the MPCA informed Domtar that it was potentially responsible for soil and water damage at and around the tar plant site and commenced proceedings against Domtar in Minnesota under state environmental statutes. Those proceedings, which continue today, have required Domtar to incur and pay substantial investigative and defense costs and will ultimately require Domtar to undertake remediation activities at the site. In 1992, Domtar sought coverage from its liability insurers, including Canadian General Insurance Company ("Canadian General"), for the claims asserted by the MPCA. When its insurers failed to provide coverage, Domtar initiated a breach of contract and declaratory judgment action in Ramsey County (Minnesota) District Court seeking contract damages and a declaration that its liability insurers were obligated to defend and indemnify Domtar against the claims asserted by the MPCA.

Of the 15 insurers included in the suit, six are Canadian, two British, and the remainder American insurers. Only Canadian General, based in Ontario and now owned by the New York investment firm of Kohlberg, Kravis, Roberts & Co.,[1] moved for dismissal based on lack of personal jurisdiction. While Canadian General was appealing an adverse ruling on jurisdiction, the case against the remaining insurers continued. Domtar voluntarily dismissed without prejudice its claims against 10 carriers, but successfully tried its claims against the four remaining carriers to a jury.

II. The Canadian General Insurance Policies and Underwriting Procedures.

Canadian General issued primary liability insurance to Domtar from at least 1956 or 1957 to 1965. The parties have uncovered only one actual policy to date, the 1960-62 policy ("the Policy"). Appendix to Brief of Appellant Canadian General to the Minnesota Supreme Court ("AA.") at 550-63 (Case No. CX-93-2449, filed January 6, 1994). The Policy states that it is a renewal of a previous policy. AA. at 550. Canadian General officers acknowledge that the terms and conditions of its coverage of Domtar from 1957 through 1960 would have been the same as set forth in this Policy. AA. at 411, 503-06. Domtar alleges that coverage by Canadian General began by at least 1956 and extended to 1965. AA. at 8.

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[1] Canadian General was purchased by Kohlberg, Kravis, Roberts & Co. during the pendency of its appeal to the Minnesota Supreme Court. Brief of Respondent to Minnesota Supreme Court at 37 n. 11. The State of Minnesota invests a substantial amount of its state employee pension funds in Kohlberg, Kravis, Roberts & Co. and its enterprises. *See Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1032 (2d Cir. 1992).

Canadian General issues comprehensive general liability insurance using the standard CGL form developed by the Insurance Bureau of Canada. AA. at 408, 439. The form currently in use, as well as the form issued to Domtar, expressly covers risks in both Canada and the United States, but excludes risks in other countries. AA. at 417, 439. If and when Canadian General wishes to limit its exposure in the United States, it must either decline to issue the policy or add an endorsement that limits or excludes risks in the United States. AA. at 418, 440. Competition and other practical factors prevent Canadian General from using a policy form or routinely adding a provision that excludes United States coverage. According to the Executive Vice President at Canadian General, routine exclusion of United States risks would mean that "we wouldn't write any business." AA. at 422.

The underwriting staff at Canadian General determines the extent of an insured's activities and sales in Canada and United States and then decides whether to accept those risks and what premium to charge for them. AA. at 419-21, 440. Canadian General keeps no records that show the number of past or present policyholders with operations or sales in the United States. AA. at 440, 476. A small sampling of the underwriting file for current policyholders reveals several which have sales in the United States, including some which paid higher premiums for the United States risks than the Canadian risks. AA. at 455-65, 469-76, 691-700.

With the passage of time, records are sparse and the persons actually involved in the Domtar underwriting are no longer available. Nonetheless, consistent with its past and current underwriting practices, the Executive Vice President for Canadian General testified that the underwriting file on Domtar would likely have included a detailed analysis of Domtar and its operations, estimated sales by types of

operations, locations of its operations, prior claims history, inspection reports pertaining to the main operations and a breakdown of Canadian and United States sales. AA. at 412-13. Based on the information about Domtar that would likely have been in underwriting files of Canadian General, combined with its commercial interest in knowing how, and in what degree, its insured has contacts with the forum state, the Minnesota Supreme Court concluded that "Canadian General constructively knew that Domtar had formerly operated a tar manufacturing facility in Minnesota." Petition for Certiorari ("Pet.") at A-15.

III. Contacts of Domtar with the Forum State from 1956 through 1965.

Contrary to the impression left by the factual recitation of Canadian General, Domtar had numerous contacts throughout the United States and in Minnesota during the years when Canadian General issued policies to Domtar. The record identifies numerous Domtar and government agency records that document the operations and sales of Domtar in the United States during this time.

After the partial demolition of the Duluth tar plant in 1954, Domtar continued to pay one of the former tar plant employees to be a watchman at the site and made payments into the Minnesota unemployment compensation fund into 1956. AA. at 83. From 1956 until at least 1958, Domtar was paying claims for roof repairs (possibly arising out of its sale of the roofing materials manufactured by the Duluth plant) in Detroit Lakes and Pine City, Minnesota, Fargo, North Dakota, and Dubuque, Iowa. AA. at 85. Between 1956 and 1965, Domtar entities owned or leased plants, offices, depots, land and timber in Michigan, California, New York, Washington, Maine and Pennsylvania. AA. at 83, 90-91. Sales in the

United States between 1961 and 1965 approached or exceeded $60,000,000 per year. AA. at 87. Newsprint sales into the United States exceeded 58,000 tons in 1960, AA. at 86, including many shipments to Duluth and St. Paul in 1964. AA. at 86, 110-14. Other activities and holdings included a joint venture with a Swedish company to manufacture and sell a lightweight concrete product in the United States, AA. at 83-84; the sale of salt into the United States, AA. at 84; construction of a lime plant in Tacoma, Washington, AA. at 85; the addition of facilities for metal powders in California and Pennsylvania, AA. at 86; and payments to vendors and government agencies in Minnesota, including the Minnesota Secretary of State, American Hoist and Derrick, Minnesota Mining and Manufacturing Co., and the University of Minnesota. AA. at 86-87. The Minnesota Supreme Court acknowledged the substantial record evidence of these activities and sales in reaching its conclusion that, due to the nature of the Canadian General underwriting process, Canadian General had knowledge of the tar plant operations in Minnesota out of which the MPCA claims against Domtar arose. Pet. at A-14.

During the period 1956 to 1965, Canadian General was aware that Domtar had operations in the United States; specifically agreed to cover claims arising out of operations and sales of Domtar in "Canada and the United States of America"; and placed no restriction in its insurance contracts regarding coverage for claims or operations in the United States, including Minnesota. Since 1965, Domtar has continued to conduct operations in the United States as well as Canada. The Canadian General policies have not been commuted and continue to be responsive, as a matter of state contract law, to claims of bodily injury and property damage that allege such injury or damage during any of the Canadian General policy years. *See Northern States Power Co. v.*

Fidelity & Cas. Co. of New York, 523 N.W.2d 657, 659, 663 (Minn. 1994); *SCSC Corp. v. Allied Mut. Ins. Co.*, 515 N.W.2d 588, 595-96 (Minn. Ct. App. 1994), *aff'd in relevant part*, 536 N.W.2d 305 (Minn. 1995); *Fairview Hospital & Health Care Serv. v. St. Paul Fire & Marine Ins. Co.*, 518 N.W.2d 41, 44 (Minn. Ct. App. 1994), *aff'd*, 535 N.W.2d 337 (Minn. 1995).

IV. Prior Experience of Canadian General Litigating in the Forum State.

Nor is it true, as Canadian General would have this Court believe, that insuring risks in Minnesota and participating in litigation in Minnesota courts on matters related to such risks is unprecedented for Canadian General. For a 16-year period beginning in 1973, Canadian General was actively involved in issuing bonds for and completing work on the Hennepin County Medical Center in Minneapolis and in related litigation with Hennepin County.

From 1973 through 1975, Canadian General issued several payment and performance bonds to Ada-Bec, a Canadian company that marketed document distribution systems in the United States. Since Canadian General was not licensed in the United States, it used an American company, Insurance Company of North America ("INA"), as a "fronting company." Canadian General would underwrite the risk, charge and keep the premium, have the bond issued in the name of INA (with the surety manager for Canadian General signing the bond as attorney-in-fact for INA), pay INA a "fronting fee" equal to 10% of the premium, and reinsure INA for 100% of the risk. AA. at 520-22. (The exhibits at AA. 567, 577 and 579 reflect this process for the Ada-Bec bonds on the Hennepin County project.) By utilizing the license of INA for the payment of a small fee, Canadian General

effectively engaged in the surety business in Minnesota and other states without a license. Leaving aside the propriety of this arrangement, it is undisputed that Canadian General has actively engaged in insuring Minnesota risks, taking Minnesota premium dollars and litigating over its obligations in Minnesota.

In 1976, before completion of the Hennepin County project, Ada-Bec became insolvent and was unable to proceed with its commitments. AA. at 523, 527. Canadian General had to step in and complete all of the bonded projects of Ada-Bec in the United States, including work on the medical center in Minneapolis. Completion of the work took six years and cost Canadian General more than $3,000,000. AA. at 529. Canadian General funded the project to completion through an entity known as the McGuire Trust. The McGuire Trust established Minnesota bank accounts and payrolls which were funded exclusively with funds advanced by Canadian General. AA. at 524-25, 527, 537-38. Canadian General also issued a comprehensive general liability insurance policy to cover the ongoing contract completion activities that it was funding. From at least 1978 through 1980, it issued comprehensive general liability policies to W.B. McGuire Engineering with an endorsement naming Ada-Bec as an additional insured for eight listed projects in Minnesota, New York, California and Massachusetts. AA. at 531-36, 609-12.

During the course of the project completion, Hennepin County sued Canadian General, Ada-Bec, and INA in Minnesota state court. All of the defendants in the Minnesota litigation were represented by counsel retained and paid by Canadian General. In its answer to the Hennepin County complaint, Canadian General did not challenge personal jurisdiction, but instead asserted numerous counterclaims. AA. at 632-51. Litigation and related arbitration in Minnesota continued until 1989. AA. at 580-604. In the course of the

litigation, Canadian General took an appeal and obtained a favorable ruling from the Minnesota Court of Appeals. *County of Hennepin v. Ada-Bec Systems*, 394 N.W.2d 611 (Minn. Ct. App. 1986), *pet. for rev. denied* (Minn. Dec. 17, 1986). In short, Canadian General not only insured risks and conducted business in Minnesota, but also sought the protection of the Minnesota judicial system when such a course of action served its interests.

V. The Decisions of the Courts below.

On November 16, 1993, the Honorable John S. Connolly, Ramsey County District Court Judge, denied the motion of Canadian General to dismiss for lack of personal jurisdiction. Judge Connolly concluded that "Canadian General purposely directed actions toward the forum State of Minnesota by issuing an indemnity policy covering claims against Domtar in any state of the United States, including Minnesota." Pet. at C-6. In particular, Judge Connolly noted that, unlike *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), in which this Court concluded that California lacked personal jurisdiction when an indemnification claim was based on events that took place in Taiwan, the property damage at issue in this case arose out of the activities of Domtar while it was doing business in Minnesota. Pet. at C-5. Judge Connolly also noted that because the property damage is in Minnesota and the people affected are Minnesota residents, "the interest of Minnesota is far greater than any state or province covered in Canadian General's policy." Pet. at C-3.

The Minnesota Court of Appeals affirmed Judge Connolly's order on June 15, 1994. Pet. at B-2. Reasoning from the evidence in the record that "Canadian General's underwriting process should have alerted Canadian General to

the possibility that its insured could be sued in a state where the insured had operated a manufacturing facility for 30 years," Pet. at B-8, the court concluded that operations of Domtar giving rise to its liability for groundwater damage and its responsibility for remedying that damage — a form of liability recognized in Minnesota since the late 1800's — was not a "fortuitous presence" and Canadian General should reasonably have anticipated being haled into a Minnesota court. Pet. at B-11.

The Minnesota Supreme Court affirmed the Minnesota Court of Appeals on June 16, 1995. The supreme court expressly disavowed reliance on the territory-of-coverage clause in the insurance policy. Pet. at A-10 n. 4 ("because the allegedly covered risk transpired in Minnesota, we need not address the issue of whether a mere territory of coverage clause, without more, is constitutionally sufficient to support personal jurisdiction over a nonresident insurer"). The court focused instead on the purposeful act of the insurer in promising to defend and indemnify the insured in the forum state, with the knowledge that the insured had conducted operations in that state which subjected the insured to ongoing potential liabilities in the forum state. Pet. at A-9. The Minnesota Supreme Court instead adopted an approach under which "the insurer must know of its insured's contact with the forum state before the court will conclude that the insurer purposefully established minimum contacts with the forum state." Pet. at A-13.

The Minnesota Supreme Court conducted a thorough review of a comprehensive record and concluded that Canadian General had constructive if not actual knowledge of the ongoing risks associated with the former Domtar tar plant in Duluth. The court noted that an insurer has a commercial interest in knowing the extent of its insured's contacts with a forum in which the insurer promises to defend and indemnify

the insured, Pet. at A-13, and that "litigation requiring the presence of an insurer is not only foreseeable, but is purposefully contracted for by the insurer." Pet. at A-12. The court cited the conservative approach of Canadian General to insuring operations in the United States and the uncontradicted testimony of the Executive Vice President of Canadian General concerning the likely contents of its underwriting file when the relevant policies were issued. Pet. at A-14 - A-15. Recognizing that Minnesota law has supported the imposition of liability on manufacturers for groundwater contamination since the late 1800's, the court also concluded that Canadian General had constructive knowledge of the operations of Domtar in Duluth and, therefore, of the Minnesota risks which it had insured. Pet. at A-14. This is consistent with the fact that Domtar at that time also had numerous operations in other states and substantial sales in Minnesota and other states — risks which Canadian General insured and about which it would have learned during the underwriting process preceding issuance of the policies.

Canadian General petitioned the Minnesota Supreme Court for rehearing. By an order filed July 25, 1994, the court denied the petition. Canadian General filed its petition for certiorari on October 23, 1995.

REASONS FOR DENYING THE WRIT

I. The Minnesota Supreme Court properly applied the precedents of this Court to the unique facts of this case in concluding that specific jurisdiction exists over Canadian General.

Canadian General has been called upon to perform its promise to defend and indemnify Domtar in Minnesota against claims asserted in Minnesota and arising out of the operations

of Domtar in Minnesota. Before entering into the contracts that contain this promise, Canadian General took measures — the underwriting process that is central to the business of insurance — to find out whatever it deemed necessary about the risks in Canada and in the United States that it was about to insure. Canadian General accepted the risks and the premiums, but now seeks to flee the forum in which its promise is to be performed. The Minnesota Supreme Court properly concluded that Minnesota has personal jurisdiction over Canadian General to determine whether coverage exists under the policies issued to Domtar and whether Canadian General breached its contracts by refusing to defend or indemnify Domtar against the claims of the State of Minnesota.

Canadian General mischaracterizes the decision of the Minnesota Supreme Court in order to create the illusion of a conflict with precedents of this Court. It is indisputable, however, that the court below was aware of the relevant decisions of this Court. Beginning with *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the Minnesota Supreme Court cited and carefully analyzed the applicable case law, including *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102 (1987). Pet. at A-6 - A-7, A-8 - A-9, A-15 - A-16. The due process test developed in these cases and applied by the Minnesota Supreme Court seeks to determine whether sufficient defendant-initiated contacts exist to establish the defendant's purposeful availment of the benefits of the forum. After careful analysis, the court below concluded that the action against Canadian General arose out of the purposeful contacts of Canadian General with Minnesota. Pet. at A-15; *see* Pet. at A-8 (*citing Burger King*, 471 U.S. at 472, and *Helicopteros*

Nacionales de Colombia v. Hall, 466 U.S. 408, 414 (1984)). Its analysis is entirely consistent with the standard developed by this Court for establishing personal jurisdiction.

The basis of the determination by the state supreme court was the deliberate decision of Canadian General to insure the risks associated with the former operations of Domtar in Minnesota. The record showed, consistent with established industry practice, that Canadian General typically goes to considerable lengths to determine the nature and location of the risks it will insure. Based on these underwriting practices and the admission of Canadian General that the same process would have been used in underwriting the policies issued to Domtar, the court below found that before issuing its policies to Domtar, Canadian General would have known about and therefore knowingly insured the risks associated with the former Minnesota operations of Domtar. Consequently, Canadian General knew or was properly deemed to have known that Domtar operated the tar plant in Duluth for 30 years and that Domtar would remain potentially liable for property damage caused by its activities at the site. Pet. at A-14 - A-15.

These jurisdictional facts are fully supported by the record before the Minnesota Supreme Court. Those facts and the explicit reasoning of that court vitiate the argument of Canadian General that the court below held that the mere issuance of an insurance policy with coverage throughout the United States created minimum contacts with the forum. Rather, the court below held that Canadian General consciously underwrote the risks arising out of the Minnesota operations and promised to perform services in Minnesota, *i.e.*, to defend and indemnify Domtar, should those risks result in any claims against Domtar in Minnesota.

Although the court below extensively cited and relied upon *Burger King* and *Asahi Metal*, Canadian General argues

that the rationale of these two cases supports its assertion that the Minnesota Supreme Court departed from the precedent of this Court. That argument is incorrect. In *Burger King*, the Court noted that, while an individual's contract with an out-of-state resident cannot alone establish sufficient minimum contacts, "prior negotiations and contemplated future consequences" can establish constitutionally sufficient minimum contacts. 471 U.S. at 479. In this case, the underwriting process and the conscious decision to insure the risks in Minnesota were part of the prior negotiations leading to the contract. The promise of Canadian General to defend and indemnify specifically contemplated performance of that promise in Minnesota should claims be asserted against Domtar there. *See* John A. Appleman, *Insurance Law and Practice*, § 4682 (Berdal ed. 1979 and Supp. 1994).

In *Asahi Metal*, this Court again noted the importance of an act of the defendant "purposefully directed toward the forum state." 480 U.S. at 112 (*quoting Burger King*, 471 U.S. at 475). The Court found a contractual promise of a Japanese supplier of tire valves to indemnify a Taiwanese tire manufacturer insufficient to permit a state court to assert jurisdiction over the Japanese valve maker on a cross claim brought by the Taiwanese tire manufacturer, which had been sued for making an allegedly defective tire. What distinguishes *Asahi Metal* from this case is the nature of the contract and its subject matter. The contract here is an agreement by Canadian General to perform services in Minnesota – to defend and indemnify Domtar in Minnesota against claims made against Domtar in Minnesota and arising out of its Minnesota operations. What Domtar seeks now is for Canadian General to provide what it promised – defense and indemnity in the forum where such claims are now asserted.

The Minnesota Supreme Court expressly disavowed reliance on the "territory of coverage" theory of jurisdiction espoused in some cases. Pet. at A-10 n.4. The decision of Canadian General to insure risks in Minnesota made reliance on that theory of jurisdiction unnecessary. Indeed, the court below noted:

> It is difficult to understand how a court could conclude that specific jurisdiction over a nonresident defendant exists when the forum is not the situs of the injury, because in such a case, the plaintiff's claim would not arise from or relate to the defendant's forum contacts.

Pet. at A-10 n.4. In light of this observation, the argument of Canadian General regarding the territory of coverage cases is beside the point.

Finally, Canadian General argues that the court below erred in ruling that the assertion of personal jurisdiction would not offend traditional notions of fair play and substantial justice. Consistent with the precedent of this Court, however, the Minnesota Supreme Court began by observing that even if minimum contacts exist, it still may be unreasonable to assert jurisdiction. Pet. at A-15 (*citing Asahi Metal*, 480 U.S. at 116). The court quite reasonably concluded that Canadian General was neither "unduly unfamiliar" with the legal system of this country nor a stranger to the Minnesota courts. Pet. at A-16 -A-17; *see Ada-Bec*, 394 N.W.2d at 612, and text at pp. 6-8, *supra*. Canadian General, based in the largest metropolitan area in Canada and owned by a large United States firm, can point to no meaningful burden caused by the resolution of its contractual obligations in the courts of Minnesota. Further, Minnesota has an important interest in

the environmental proceedings that are the subject of the coverage dispute. The underlying claims are asserted in Minnesota by a Minnesota agency on behalf of Minnesota, its citizens and its natural resources. Witnesses with knowledge of the underlying claims and the necessary remediation efforts, factors that will drive overall costs and the concomitant financial exposure to Canadian General, are in Minnesota. Pet. at A-17. Canadian General points to no fact and cites no decision of this Court which would indicate that the Minnesota Supreme Court acted unreasonably in relying on these facts to find that the assertion of Minnesota jurisdiction comports with traditional notions of fair play and justice.[2]

II. The central issue is a narrow factual dispute that presents no opportunity for this Court to resolve an important and recurring issue of federal law.

This case does not present the Court with an opportunity to address an important, unsettled question of federal law. Rather, it merely poses the question whether the record supports the factual conclusions drawn by the courts below. The decision of the Minnesota Supreme Court is a straightforward application of the precedents of this Court and

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[2] *Cf. Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 131, 649 A.2d 379, 391 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1175 (1995) (merits of analytically similar *forum non conviens* claim raised by Canadian General described as "flimsy at best"). The interest of Minnesota in applying its own law also supports the retention of jurisdiction over parties and claims affecting Minnesota resources. This Court has held that due process is not violated by the application of the law of the forum state – as was the case here when the courts below applied Minnesota law to this contract dispute. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179 (1965).

Minnesota law to specific facts. The certiorari jurisdiction of this Court simply is not used to resolve such limited factual questions. Given that the Minnesota Supreme Court carefully reviewed the record and applied to the facts the relevant precedent of this Court, the observations of then Justice Rehnquist are germane:

> The only remaining issue presented by applicant is whether the quality and nature of its contacts with the State of California are such that "maintenance of the suit [in the forum state] does not offend `traditional notions of fair play and substantial justice . . .'" Such questions generally tend to depend on the particular facts of each case, . . . and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. While the Superior Court's decision does not purport to resolve all of the factual disputes between the parties, there is no indication that it failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it is unlikely that this issue would command the votes necessary for certiorari.

General Council on Finance and Administration of the United Methodist Church v. Superior Court of California, 439 U.S. 1369, 1373-74 (1978) (citations omitted) (brackets in original). This case similarly lacks any issue worthy of certiorari.

The Minnesota Supreme Court expressly eschewed reliance on any special or expansive rule for insurance contracts or on a territory of coverage rationale for asserting jurisdiction. Indeed, it indicated that it would not, given the precedent of this Court, merely rely on the territory of coverage provision in the policy to sustain jurisdiction. Pet. at A-10 n.4. This Court should reject the attempt by Canadian General to manufacture a question worthy of certiorari out of an issue that the Minnesota Supreme Court expressly disavowed.

III. The cases cited by Canadian General are not in conflict with the decision of the Minnesota Supreme Court.

Canadian General asserts that the decision below conflicts with decisions of various state and federal courts. One alleged conflict is with a decision of the New Jersey Supreme Court in which that court held that no jurisdiction existed over Canadian General in an insurance coverage dispute in New Jersey. *See Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 649 A.2d 379 (1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1175 (1995). The second asserted conflict is with several automobile insurance cases involving territory of coverage clauses where courts divided over the significance of those clauses in establishing jurisdiction.

Waste Management is easily distinguished. A waste hauler and its subsidiaries sued more than 150 insurers to determine insurance coverage issues for more than 97 landfill sites, most of them outside New Jersey. In contrast to the situation here, Canadian General in that case had expressly limited its coverage of the Canadian subsidiary of the United States-based parent to *claims arising out of the operations of that subsidiary in Canada*. In the underwriting process,

moreover, Canadian General had determined that the Canadian named insured had no operations outside Canada. 138 N.J. at 127-28, 649 A.2d at 389.

Under the rationale the Minnesota Supreme Court employed, it would have decided the New Jersey case the same way the New Jersey court decided it. The Minnesota court looked at the underwriting process and the knowing decision of Canadian General to insure risks arising out of the former operations of Domtar in Minnesota. In contrast, in *Waste Management*, Canadian General had expressly excluded coverage for United States risks, and its actual insured conducted no activities in New Jersey. In light of these disparate facts, there is no "conflict" between the Minnesota and New Jersey decisions. As in *Waste Management*, certiorari should be denied.

Canadian General also alludes to the territory of coverage rule in an attempt to manufacture a conflict with decisions of other state and federal courts which have rejected the rule in its most rudimentary form. Again, the Minnesota Supreme Court expressly eschewed reliance on the territory of coverage rule, stating:

> [I]n the present case, because the allegedly covered risk transpired in Minnesota, we need not address the issue of whether a mere territory of coverage clause, without more, is constitutionally sufficient to support jurisdiction over a nonresident insurer.

Pet. A-10 n.4. Contrary to the innuendo of Canadian General, the Minnesota Supreme Court meant what it said. It relied on *Farmers Ins. Exchange v. Portage LaPrairie Mutual Ins. Co.*, 907 F.2d 911 (9th Cir. 1990), not for the proposition that

purposeful availment may be found "entirely from the presence of a territory of coverage clause," Pet. at 21, but as a decision exemplifying an approach to jurisdictional analysis under which "the insurer must know of its insured's contact with the forum state before the court will conclude that the insurer purposely established minimum contacts with the forum state." Pet. at A-13. Indeed, in *Farmers Ins. Exchange*, the evidence indicated that agents of the carrier knew the insured's vehicle would travel to the forum state. 907 F.2d at 915. This approach, as the court below noted, is entirely consistent with the precedents of this Court. *See Eli Lilly and Co. v. Home Ins. Co.*, 794 F.2d 710, 721 (D.C. Cir. 1986) (jurisdiction affirmed, in part, because "an insurer has a commercial interest in knowing how, and to what degree, an insured manufacturer has contacts with a forum state.") *cert. denied sub. nom Falcon Inc. Co. v. Eli Lilly and Co.*, 479 U.S. 1060 (1987). Two cases Canadian General cites, *Payne v. Motorists' Mut. Ins. Co's.*, 4 F.3d 452 (6th Cir. 1993), and *Rossman v. State Farm Mut. Auto Ins. Co.*, 832 F.2d 282 (4th Cir. 1987), both involved the territory of coverage rationale, on which the court below did not rely. Moreover, both cases involved an accident that took place within the forum. Thus, *Payne* and *Rossman* are not in conflict with the result reached below.

In the two cases that purportedly conflict with the decision of the Minnesota Supreme Court, the essential knowledge of the insurer concerning the insured's contacts with the forum state is missing. In *Batton v. Tennessee Farmers Mut. Ins. Co.*, 736 P.2d 2, 7 (Ariz. 1987), the court expressly relied upon the fact that "nothing in the record permits [the inference] that [the insurer] conducted its business knowing that it was regularly coming into contact with [the forum state]." Similarly, in *Meyer v. Auto Club Ins. Ass'n*, 492 So.2d 1314, 1315 (Fla. 1986), both the insured and the insurer were residents of Michigan and the insurer had no

reason to know that the insured would operate its vehicle in Florida. The court stated:

> That [insured], while a Michigan resident, was involved in an automobile accident in Florida, or that he eventually moved to Florida, are mere unilateral acts of the [insured] and cannot, in and of themselves, provide [the insurer] with the requisite minimum contacts mandated by the fourteenth amendment.

Id. In neither of these cases was there any evidence of a conscious decision by the insurer to underwrite the risk in the forum. The policies merely included a standard form provision that provided insurance to automobile drivers anywhere in the United States. Both cases also involved automobiles, which temporarily can be anywhere within the territory of coverage. Unlike those transient risks, the commercial liability risks insured here arise out of manufacturing operations in the forum state and a conscious underwriting decision to insure those risks. Thus, there is no conflict between the decision below and the rationale for the decision in *Batton* and *Meyer*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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